Agency Report to the
JOINT COMMITTEE ON ADMINISTRATIVE RULES
(excerpt)

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
DIVISION ON DEAF AND HARD OF HEARING

QUALIFIED INTERPRETER – GENERAL RULES

AGENCY REPORT, NARRATIVE

Excerpted narrative portion of Agency Report providing foundational principles and summary/analysis of the subsequently promulgated rules

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INTRODUCTION

It is important to note from the outset that Michigan's Deaf Persons' Interpreter Act, (MCL 393.501 et. seq.; PA 204 of 1982) does not itself provide anyone with the right to an interpreter. It is laws like the federal Americans with Disabilities Act (ADA), Individuals with Disabilities Education Act (IDEA), and Michigan's Persons With Disabilities Civil Rights Act (PWDCRA) that guarantee deaf, deafblind and hard of hearing are provided equal communication access. Questions about when an interpreter is required or who must provide one must first be addressed under these laws.

The Deaf Persons' Interpreter Act simply, but significantly, requires that: "If an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter." (MCL 393.503a)

The Interpreters' Act then calls for the promulgation of rules that will define who a "qualified" interpreter is, and that govern the standards under which interpreters practice. Specifically, the Act provides that the State's Division on Deaf and Hard of Hearing, which is now a part of the Michigan Department of Civil Rights, "shall promulgate rules . . . that govern procedures for application, testing, revocation, suspension or limitation of certification, continuing education, renewals, and grievances, minimum credential requirements and levels, and minimum standards of practice." MCL 393.508a(1) These proposed rules are offered to satisfy this legislative requirement.

FOUNDATIONAL PRINCIPLES

The primary purpose of the Agency Report in support of a proposed rule set is to analyze and respond to specific requests for changes submitted in response to a published previous draft of the rules. This entails summarizing the requests as they relate to specific rules, determining whether there are other suggestions or comments that relate to the issue(s) raised, and determining whether it is believed the public policy generally and the purpose of the statute calling for the rules in particular, will be best served by making the requested change, rejecting it, or addressing the concern in some other way. This requires a narrow focus on individual rules.

Because these will be new rules, and because of the volume of public comment and the great public interest in these rules those comments represent, a broader overview of the rules as a whole is appropriate. The specific rule-by-rule analysis that follows this introductory section can best be understood when each can be examined in the context of an understanding of the general principles that guided the drafting of the individual rules. It is hoped that this foundation will not only assist those seeking to understand the response to individual requests for changes, but that it will also provide a framework under which any future question about the intent of a particular rule can be addressed.

Michigan law requires that when being provided as an accommodation to a d/db/hh person, an interpreter must be <u>both</u> qualified <u>and</u> effective.

The ADA, PWDCA and other federal and state laws provide that government bodies, businesses and nonprofit organizations that serve the public must be able to communicate effectively with people who have communication disabilities. The goal of these laws is to provide equal access to services, enjoyment and opportunity, by ensuring that communication with people with these disabilities is equally effective as communication with people without disabilities, so that they receive equal enjoyment and equal opportunity. These laws provide that when doing so is necessary in order to establish effective communication, an interpreter must be provided as an accommodation for a deaf, deafblind or hard of hearing person.

The purpose of the effective communication rules is to ensure that the individual with a communication disability can effectively receive and convey information and thereby access and enjoy the same public services available to others. What effective communication looks like will vary from one person to another and from one situation to another. In each situation, the key to deciding whether an interpreter is needed in order to establish effective communication and whether a particular interpreter is communicating effectively is to consider the nature, length, complexity, and context of the communication as well as the person's normal method(s) of communication.

The requirement to provide an interpreter who can establish the effective communication mandated by various disability-related anti-discrimination laws is not the only consideration necessary when selecting an interpreter required as an accommodation. Michigan law expressly provides that the interpreter must also be "qualified," meaning certified to have the objective technical skill level necessary to handle the nature or substance of the communication.

The Deaf Persons' Interpreters Act provides at MCL 393.503a and 393.503(4) respectively:

If an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter.

And

A qualified interpreter shall not be appointed unless the appointing authority and the deaf or deaf-blind person make a preliminary determination that the qualified interpreter is able to readily communicate with the deaf or deaf-blind person and to interpret the proceedings in which the deaf or deaf-blind person is involved.

While the law requires the appointment of an interpreter who is BOTH qualified and effective, many of the comments seeking changes to the proposed rules wrongly treat the two ideas as being the same. Many argue that qualification standards should be lowered based on something other than determining the appropriate level of required skills whenever communication appears outwardly to be effective, or at least comfortable. Others argue that once a properly credentialed, and thus qualified, interpreter is provided, there is no reason to be concerned about whether that interpreter meet the needs of, and thus can actually communicate with, the particular deaf person to who they are assigned. Both contentions are legally fallacious and are rejected.

Qualified Interpreter:

Standards for minimum credential requirements and levels, and minimum standards of practice must be based upon the goal of providing effective communication by ensuring that an interpreter enters an assignment with a general skill level as well as any specific subject knowledge and understanding likely to be necessary.

Real time interpreting is a difficult task. While it may be American, American Sign Language is not a signed version of the English language. Like any spoken language, ASL is a language with its own unique rules of grammar and syntax, separate and apart from English Michigan High Schools may offer ASL as a foreign language and give foreign language credit to students taking it (380.1157b) because Michigan recognizes the process of learning it is no different than any other second language.

Sign Language/spoken English interpreters are highly-skilled professionals that facilitate communication between hearing and deaf or hard-of-hearing individuals. They are a crucial communication tool utilized and relied on by ALL parties involved in a communication or proceeding in which at least one person uses a spoken language to communicate and at least one communicates by sign. Interpreters must be able to listen to another person's words, inflections and intent and simultaneously render them into the visual language of signs using the mode of communication preferred by the deaf consumer. The interpreter must also be able to comprehend the signs, inflections and intent of the deaf consumer and simultaneously speak them in articulate, appropriate English.

Even before considering accuracy, it should be recognized that the impression one person makes on another is largely dependent on their ability to communicate. When an interpreter is involved it is impossible for one party to a conversation to know whether the need to repeat an important point in order to be understood is a reflection on the other party's ability to comprehend, or way the point is being conveyed by the interpreter. One party's conclusion that the other has a poor vocabulary, lacks language skills, draws wrong conclusions, is prone to misunderstandings, or lacks subject matter familiarity may well be the result of incomplete or inaccurate interpreting.

One helpful way to think of what it means to be qualified is to imagine that a loved one has a medical emergency in a non-English speaking country. What English skills would it be necessary for the foreign language interpreter to possess before you would feel comfortable discussing your unconscious child or spouse's treatment options with the treating physician who speaks no English? Certainly, being qualified to interpret requires a different and higher standard than just the ability to communicate. It is also different in some settings (like medical emergencies) than others. A qualified interpreter is thus one who possesses the training and experience necessary to permit the parties to a communication to have a level of confidence that permits them to act based on the belief that the details of the communication have been not only accurately, but also completely, understood by all involved in it.

It is tempting, but ultimately incorrect, to think of interpreting as translating, although translating is a critical part of the process. Consider a phone conversation that you need to have with your accountant, lawyer, work supervisor, or child's teacher while you are unable to hold the phone.

Using an interpreter is much like going back to a time before speakerphones and using a third party as a relay. The relay repeats what you say to the person you are talking to, and then repeats to you what the other person replies. Whether any given person would be "qualified" to act as that relay would depend not only on their familiarity with the English language, but also their ability to recall and repeat accurately and to correctly convey not only language but also tone. Most illustratively in this example the "qualifications" that the process requires will depend greatly on the content of the conversation. One might well place confidence in a relay with little vocabulary and no special expertise if merely confirming an appointment with an accountant, but require something more if discussing a tax filing. We are more likely to be concerned with the way the relay's delivery reflects back on ourselves when the call is with our supervisor than the accountant. We are unlikely to trust anyone to relay an important legal negotiation or medical diagnosis unless we have confidence that the relay had enough basic understanding of necessary terminology and concepts. Again, "qualified" relates to ability to confidently put faith in the accuracy of one's perception of the communication.

The accuracy of sign language interpreting is literally as important as the information being conveyed. Effective interpreters in medical, legal and educational situations require not only advanced interpreting skills, they must have a familiarity with special terminology and an understanding of the process in which the play a part.

The Interpreter Act and these proposed rules are structured on the principle that interpreting is a profession, and when it is legally required to be effective it must be practiced only by professionals. Minimum competency standards are required before entering the profession. Continuing education must ensure that competency is maintained. Special competencies are required for specialized situations. These rules are structured around determining what the appropriate minimum standards are.

It is therefore critical that minimum competency standards be sufficient to provide all parties to a communication with sufficient confidence to act based on their understanding of it. Further, necessary interpreter qualifications must be based on the nature and demands of the interpreting task without consideration of factors unrelated to whether the interpreter can be relied upon to meet the challenge.

Professional standards of competency and/or conduct cannot be lowered simply to meet the skill levels of those presently available.

As noted above, the law requires effective communication. These proposed rules apply what has been determined to be the minimum acceptable qualifications and standards. In every instance there were commenters who complained that the standards were lower than what they should be. In every instance there were also commenters who complained that the standards were too high for the limited number of interpreters, or required testing that was too difficult. A number of commenters suggested that the recommended standards were inappropriate for the demands of the applicable interpreting task. In some instances it was indicated that the standards were what they should be, but that the rules should allow new interpreters to interpret for several years without having met the standards.

We do not expect to show up for an appointment with a doctor, lawyer, accountant, therapist, dentist, or real estate agent only to be told that the office has determined they scheduled us with someone else who was almost passed the licensing test. If we did, it would not be sufficiently reassuring to hear that the alternate will likely be certified in a year or two because with some additional practice (on us) they should be able to pass the test. Yet far too many of the comments we received from deaf, deafblind and hard of hearing Michiganders make it clear that this is exactly the message deaf persons have come to expect (and are expected to accept), with regards to requested interpreters when arriving for those same appointments.

Many of those voicing objections to these proposed rules have offered what they see as a simple solution to the above scenario. The fallacy of the solution they offer to prevent the substitution of an unqualified interpreter in the above scenario becomes quickly evident if it is applied to substitution of the other professionals.

It is suggested that the standards of practice for, the credentials to be required of, or the rigors of the testing that must be passed by, interpreters should be lowered because doing so will make it possible to provide a "qualified" interpreter in every instance where one is required. While it is cynically true that this would provide interpreters who meet the regulatory definition of qualified, it is also an unconscionable approach to public policy.

We would certainly reject any suggestion that the best way to protect the public against a potential shortage of doctors, lawyers, accountants, therapists, dentists, or real estate agents, would be to lower the testing requirements for becoming one. Nor would it ever be acceptable to say that a dentist who is not qualified to practice in a southeastern urban area of the state becomes qualified by moving to a rural UP community that is looking for one. State certification that a professional is "qualified" must be based solely on a determination and verification of the skill set that allows the public to confidently rely upon that professional's competence.

Thus another of the basic principles underlying these rules is:

There can and will be legitimate reasons for permitting the use of an underqualified, or even an unqualified interpreter in particular situations and at particular times, but none of these reasons make the utilized interpreter any more qualified than they are.

Much can be, and has been, said about the shortage of interpreters in Michigan. One thing though is for certain: If there is one interpreter who is qualified for a particular function residing in a community and two who are not, when the qualified interpreter goes on vacation the community does not magically have two qualified interpreters.

Although many of the comments received about the proposed rules suggest this idea is somehow radical, it is simple common sense. It is also the bedrock of the approach these rules take in order to properly address the legislative directive for creating standards of practice which include the identification of the minimum qualifications needed to assure necessary competency, while also taking into account the reality of the present state of the market. An appointing authority cannot be required to provide an interpreter who doesn't exist; thus when circumstances require it the rules must allow for the authority to provide the closest to fully qualified interpreter

available. However, the rules do not (and it is believed must not) suggest that an interpreter actually becomes qualified simply because nobody more qualified is available.

These proposed rules thus recognize that emergency situations, regionalized shortages of interpreters, and other factors outside the reasonable control of the appointing authority may make it impossible for them to provide a qualified interpreter at the time when one is required. The rules address these situations by recognizing "waivers" for when the d/db/hh person wishes to proceed without a qualified interpreter, "exceptions" for when a school or other appointing authority and the Division on Deaf and Hard of Hearing agree that no qualified interpreter is available and "variances" for those situations where the d/db/hh person and an appointing authority may not necessarily agree on the appropriate way to proceed, but the appointing authority believes they are complying with all appropriate state and federal laws. The broad area of variances is intended to include the ADA- and PWCRDA-type deliberative process that is standard practice and the subject of much legal guidance and case law.

It is impossible to predict how long any current shortage of qualified interpreters may persist. Thus it is impossible to provide statewide timetables for 'grandfathering' the use of underqualified interpreters. A market-driven approach can provide the proper incentives to increase the pool of qualified interpreters, while also providing the maximum protection possible in the interim.

These rules reject the suggestion that government can predict or control the availability of qualified interpreters. The proposed rules do not attempt to determine how long it will take for existing interpreters to improve their skills, for new and more highly skilled interpreters to become available, or for how much longer such things may take in some parts of the state compared to others. The rules are instead intended to adopt a market-driven approach.

- Minimum qualifications and standards are established based only upon those criteria determined to be necessary for the public to rely that an interpreter who is so certified as "qualified" possesses the minimum training, skill and ability necessary to perform.

- Whenever an interpreter who meets the qualifications and standards can be provided, they must be provided.

- If, and only if, no fully qualified interpreter can be secured, the rules permit providing the best possible accommodation possible under the circumstances and only until a fully qualified interpreter is available.

This approach causes all parties involved to recognize when the mandate to establish effective communication is not being fully met, and it requires them to determine the best way to proceed until it can be. As described above, the use of an underqualified interpreter is defined only be actual necessity, and cannot be justified otherwise. Most important it provides notice and incentive to those who might wish to work as ASL interpreters in the future.

To the extent that those who oppose the 'high' standards contained in the proposed rules are correct that there will be insufficient numbers of qualified interpreters, interpreters who do not

meet the requirements may continue to be utilized. However, it will not be these rules that determine how long such situations may continue, it will be the market.

Whether currently working, in training, or merely considering becoming an interpreter, everyone is on equal notice that whenever an interpreter who meets the qualifications and standards can be provided, they must be provided. An underqualified interpreter receiving assignments based on a shortage will understand that they need to improve their skills before someone else either becomes qualified or moves. An appointing authority who wants to continue to utilize an interpreter who needs training will have incentive to provide it in order to keep the person, rather than an incentive to keep the person at a skill level where they might be paid less. Qualified interpreters unable to find assignments in one area of the state might be willing to move to another to find work, but only because they won't be turned away in favor of a less qualified local person.

The educational interpreter requirements proposed provide a good example of this approach. The rules will require an EIPA test score of 4.0 or above beginning with the 2016 school year. Many provided comments claiming that this requirement was "too high" and would result in a shortage of qualified interpreters. Notably, these comments did not assert that the requirement was inappropriate; most in fact conceded that it correctly reflected the qualifications necessary to do the job. These commenters none-the-less requested changes to the rules lowering the required score beyond the proposed two-year phase in period in order to increase the availability of "qualified" interpreters after 2016. The proposed rules reject such suggestions. First, because once 4.0 is recognized as the appropriate floor below which an interpreter is not fully qualified, it is unacceptable to continue to utilize that interpreter by deceptively titling them as qualified – but most importantly because there can be no room in these rules for continuing to provide a student with an interpreter who is not qualified, if a qualified one is available.

An underqualified interpreter hired in the fall of 2016 is neither deemed qualified nor "grandfathered" into the position for a pre-determined number of years. They hold the position until the marketplace corrects the supply shortage. If that interpreter gains certification by the next school year, they can remain in the position. If he or she does not but another underqualified interpreter does, or a qualified one moves into the area, the student receives the fully qualified interpreter.

It is believed that this market-driven approach will provide the greatest incentive to correct for any shortage of qualified interpreters. Thus, after a roughly two year initial transition period, these rules decline to arbitrarily extend the period of time during which underqualified interpreters can be used and instead limit such use to those instances when it can directly be shown to be necessary.

The proposed rules do NOT require that any deaf, deafblind, or hard of hearing person give up any accommodation they are already receiving for any reason other than to receive one they agree will be more effective.

Spurious information is being circulated that caused some comments to be received from individuals who expressed very real, but equally unfounded, fear about the proposed rules. These came primarily from individuals who are currently being provided interpreters who do not

meet the proposed standards, but also from others who claim to be concerned about the interests of such individuals. These comments all suggested lowering the qualification standard for interpreter because the accommodation currently being received is 'better than nothing.'

The premise on which these comments are based is a false one. Writers have been led (or at very least allowed) to believe that once the rules are in place the only alternative to a qualified interpreter will be no interpreter at all. To the contrary, and as established already, the proposed rules recognize there will be situations that require determining what the best alternative is when a qualified and effective interpreter cannot be provided.

These rules should never be misconstrued to suggest that the best available alternative to a qualified interpreter cannot be provided because it fails to comply with any particular rule. If these proposed rules are being implemented to cease any existing accommodation, it can only because a more effective communication accommodation is being provided.

Effective Interpreting:

Unlike the objective and measurable standards for determining whether an interpreter is qualified, effective communication is neither quantifiable nor universal.

As initially noted, Michigan law requires that when being provided as an accommodation to a d/db/hh person, an interpreter must be both qualified and effective. An appointing authority, or indeed anyone who knows what minimum standards are required, can objectively determine whether a given interpreter is qualified for a particular task. The same cannot be said for whether that interpreter will be effective. Even the most qualified interpreter, and even one who with a reputation as being particularly effective, may not be effective in a particular situation.

Effectiveness can be affected by dialect, vocabulary, vision, age and other factors too numerous to mention. If an interpreter is unable to understand what a party to a conversation is stating, or that person unable to understand what the interpreter is relaying, communication cannot be effective. It also, to some extent can depend on the situation. An ASL interpreter who cannot look at needles or blood will not be effective in some medical settings, because he or she cannot both look away and read sign at the same time.

Effectiveness is thus impossible to quantify, and the rules do not attempt to do so. It is largely subjective, and entirely dependent on unique and individual perceptions and abilities. It often cannot be predetermined and becomes apparent only after a proceeding has begun. The rules thus rely in this area much more heavily on incorporating the body of case law associated with acts like the ADA which establish the need to provide the interpreter as an accommodation. None-the-less, there are a few common principles which should underlay any application of these rules.

Effective Communication is a two-way process, if communication is not effective for any party, it is not effective.

This foundational principle reflects the reality that in almost all instances, no individual party to an interpreted conversation has the ability to assess the quality of the translating taking place.

Almost by definition an interpreter is brought into a communication because those involved lack a common language. Either party knows for certain only what they say, and what the interpreter says the other party(ies) said. When the doctor says "we got the results and your cancer tests came back positive," but the interpreter relays to the patient that the "tests came back good" neither the patient nor doctor is aware of the miscommunication, and both will be negatively impacted by relying on it.

In addition to the reality that we cannot assess the quality or content of the message in its translated verses original form, an interpreter can only be as effective as their weaker language. Because interpreting spoken English to sign requires the ability to hear, interpreters will almost always be native English speakers with a fluency in ASL. This is not to suggest that an interpreter may not be as fluent in ASL as in English, only that it is a mistake for a participant in a communication to judge the interpreter's fluency in the language the participant does not speak based on the fluency in the language they do.

Video Remote Interpreting presents a tremendous opportunity to provide greatly increased communication access to d/db/hh persons, but it is never truly and fully equivalent to a qualified on-site interpreter.

The use of Video Remote Interpreting was the subject of a greatly disproportionate percentage of the comments received. VRI is unquestionably a "game changer" and a net positive for the effort to provide communication access to all d/db/hh individuals. It allows spoken English and English Sign Language individuals to communicate with each other when in the same location through the use of an interpreter who is off site, but able to view and send ASL over a video link. Its chief advantage is that it can introduce an available interpreter into any location with the necessary equipment on a moment's notice.

More detailed discussion will follow when reviewing the suggested changes to the specific relevant rules, but the specific responses do share a common foundational principle. Communication achieved using VRI is never the same as communication achieved using an in-person interpreter.

By definition, VRI introduces potential barriers (video, audio) to the communication process. It is always dependent on the quality of the connection, as well as other technical issues like screen size, resolution, and positioning. It is always equally dependent on the individual participant and things like their comfort with technology, quality of their eye-sight, their ability to manipulate the screen, and their mental acuity in what may be a stressful emergency situation.

More important, even when the technology works perfectly and individuals are comfortable using it, even when the screens are large enough, the resolution high enough and the connections

fast enough to produce clear smooth pictures, VRI often is still a poor substitute for having an interpreter present in the room. VRI interpreters may be able to see the patient's hands sufficiently, but they cannot also view whatever chart or other item the doctor may be pointing to or referencing. An on-site interpreter can move around a room to facilitate communication in ways VRI makes impossible (we can all probably relate to what it looks like to pan a video camera at fast we turn our heads). It is often difficult for a d/db/hh person to watch what the person speaking is doing and the interpreter at the same time, but this problem is compounded when the interpreter is on a small screen and impossible if the screen is not always within the same peripheral view. There is also a trust and intimacy with an on-site interpreter that may be critical to some persons when dealing with life's most personal issues and concerns.

For these and other reasons, the rules begin from a foundation that recognizes the tremendous potential for improved access to communication offered by VRI. At the same time, these rules believe that the subjective and individual nature of the effectiveness of any communication require that VRI be used only when it is either consistent with the d/db/hh wishes, or is demonstrably necessary under the circumstances. At least for the present time, this means VRI should be used principally in two instances: first, in predictable and low-risk situations where its use has been discussed and is not objected to; second, on a temporary basis in emergency situations, and while every reasonable effort is simultaneously being made to provide a fully qualified on-site interpreter as soon as possible.

As noted by Christopher Hunter, the former Director of the Division on Deaf and Hard of Hearing for 27 years: "I am a supporter of VRI as an option. I think it is a wonderful technology, and I used it a lot in staff meetings within my office, because we didn't have an interpreter available, so I would use it. These rules are written clearly to protect you. VRI, there must be a qualified interpreter. They have to have certain things set in place or they can't have it. If it is ineffective communication, then we need to tell them, like the person who was up here earlier that was speaking and talking about (a bad experience when they were forced to use VRI when seeking medical attention involving arm pain). It is too bad we didn't have the rules at that time. But in the future we will. So it will be a fair exchange."

VRI can be an effective tool, if it is used appropriately. These rules are intended to ensure it is both.

Effective Communication is individual and cannot be fully known to others. Each person's assertions related to effectiveness must therefore be properly respected.

This is the most difficult dilemma when trying to assess the effectiveness of any communication accommodation. It is ultimately impossible to ever know with any degree of certainty whether another's complaints are exaggerated. This is true in any context where a d/db/hh person indicates they are "unable" to communicate with a given interpreter, but it is even more amplified when the objection is to something like the use of a video relay service in order to facilitate communication with the interpreter. Certainly, a given individual can have increased difficulty following something on a digital screen, particularly depending on the size of the screen, but how can it be determined whether that goes to the person's comfort level or the effectiveness of the communication?

These rules take the only approach possible in these instances, whether involving technology or otherwise. A party's statement that something is not effective must be accepted unless there is a good faith reason for doing otherwise. When any party to a communication is entitled to an interpreter as an accommodation, every person has an equal right to ensure that the interpreter is both qualified and effective. If any party asserts that they are not receiving effective communication, but that effective communication would be possible, that person is entitled to the change unless providing it creates an undue burden or fundamental alteration on the appointing authority. These rules are not intended to change that formula, only to clarify and facilitate its application.

PART 1. GENERAL PROVISIONS

DEFINITIONS RELATED TO WAIVER

Rule 2 was amended to include;
(m) "Exception" (added);
(z) "qualified interpreter" (amended);
(mm) "underqualified interpreter" (added),
(nn) "variance" (added); and
(qq) "waiver" (amended).

The discussion related to these changes is included as part of the discussion of Rule 58 (Waivers).

OTHER DEFINITIONS

Suggestion Rule 2(g):

Asher, Nancy Asher (T-19, W-262) and **Bethany McLain** (W-314), and **Sandra Maloney** of the **Michigan Registry of Interpreters for the Deaf r**equest the addition of a definition for "hard of hearing." Ms. Maloney notes that the Deaf Person Interpreters Act provides definitions for both deaf and deafblind persons, but not for a hard of hearing person. These rules do not, however, require a specific definition for hard of hearing, and it is not believed they are the appropriate place for attempting to define the boundaries of the term's application. Nothing in the Act or these rules applies differently to a person depending on where they appear on a spectrum from hard of hearing to deafness. These rules do not define when an interpreter is to be provided as an accommodation, nor do they define who is entitled to one. The terms for deaf, deafblind and hard of hearing are applied collectively to cover all persons to who state or federal law requires that an interpreter be provided as an accommodation.

Response: An amended version of Rule 2(8) is being proposed.
The definition of "D/DB/HH" contained in Rule 2(g) was amended to more specifically note that the term's use in the Act and Rules was intended to include any person who under state and federal law was to be provided an interpreter.

Suggestion Rule 2(gg) and (q):

A number of comments, like those of **Natalie Grupido** (T-34, W-125), **Dianna McKittrick** of the **Communication Access Center** (W-228), and the **Michigan Deaf Association** (W-244), related to the definition of sign language. They requested both that the description of sign language be adopted from one used by the National Association of the Deaf, and that the definition specifically reference American Sign Language.

Response: Amended versions of Rule 2(gg) and 2(q) are being proposed.
The specific changes requested to definition of "sign language" in Rule 2(gg) were made. Additional descriptive language was also added to the definition of "Interpreting" in Rule 2(q).

Suggestion Rule 4 (Reasonable notice):

The Interpreters' Act includes a provision at 393.504(1) indicating that a person requiring an interpreter as an accommodation "…shall provide reasonable notice to the appointing authority of the need for a qualified interpreter." The proposed Rules define "reasonable notice" as "the minimum advanced notice required under the circumstances for the appointing authority to secure an interpreter."

The attempt to provide greater guidance on reasonable notice in Rule 4 has been an evolving one. When an earlier draft was before JCAR it included two time frames that were deemed to provide reasonable notice. In emergency situations notice was reasonable if provided "as soon as the need is identified." Otherwise notice was reasonable if provided to the appointing authority "(a)t least 3 days prior to a scheduled event." Both these descriptors proved to be problematic. Emergency, it was believed, was too vague a term in this context where a sick child would always be an emergency to a parent; but the common cold may not be an emergency to a doctor. Even more problematic was the attempt to quantify reasonableness by providing an outside limit of three days. This, depending on who was asked, was both too long and too short a time period. There was also concern that the language implied that providing reasonable notice somehow guaranteed an interpreter rather than simply requiring an attempt to find one.

Before one can determine what notice is reasonable, it is important to understand what receiving reasonable notice obligates an appointing authority to do. Even when a d/db/hh person notifies an appointing authority of the need for an interpreter well in advance of an appointment, doing so cannot guarantee a qualified interpreter can be found, but it obligates the appointing authority to try. Thus the previously contemplated three day rule would have permitted any appointing authority to simply say no when asked for an interpreter for an available appointment the next day. This may well be a very fair line to draw for most businesses, but it is an arbitrary line that

cannot be justified in all instances. Longer notice might be reasonable in an area where qualified interpreters are harder to secure, or when they are being sought for a communication that can easily be delayed without harm. On the other side of the coin, if a doctor's office has an available appointment for the next day, how is it "equal access" to suggest they shouldn't even make a phone call to see if an interpreter might be available?

Conceding that there were too many factors involved in determining what amount of advance notice was reasonable, the draft rule proposed for comment did not include any universal declaration of a period of time that would be deemed reasonable in all circumstances. It instead provided a brief clarification that, while the law does permit an appointing authority to require reasonable notice of the need to seek an interpreter, they may not require a notice that was longer than what was reasonable. It also provided a few examples of the types of factors that were to be considered in determining what notice requirement could be reasonable under the circumstances. It also stated that doctors can't require deaf patients to call before they get sick.

We heard numerous stories from individuals who, while not specifically referencing the rule or definition of reasonable notice, talked about the consequences resulting from appointing authorities' failures to make reasonable effort to secure an interpreter in the time that was available. A few, however, were quite specific in targeting the Rule 4. The breadth of the comments supports the conclusion that the reasonableness of notice cannot be narrowly defined, and no one-size-fits-all predetermined time frame is possible. These included:

Ascension Health (W-085), expressed their concern that, by defining notice as always being reasonable when provided by a d/db/hh individual "as soon as medical, legal or emergency need is identified," the reasonable notice definition was overly expansive. They contend this language "significantly expands the circumstances when notice is considered reasonable to include all medical situations (e.g., patient decides to stop by urgent care for a cold)." Ascension requests that the rules language revert to the language that had been previously proposed, including the provision that notice is reasonable if given at least three days in advance, and that the provision indicating notice was always reasonable when given at the first opportunity be limited to emergencies only.

LanguageLine Solutions (W-179), who provide VRI services to, among others, health care facilities and hospitals like Ascension, take a different perspective. LanguageLine believes that even with the "as soon as the need is identified", the draft's inclusion of any language requiring advance notice is misleading. "We are concerned that the requirement that a person needing an interpreter request the services in advance of a meeting/appointment could threaten the availability of an interpreter if the person fails to request the interpreter in advance. We also are concerned that it could result in limiting the use of VRI."

Susan Lundy (T-102), a deaf woman who spoke at the public hearing in Flint, also doesn't much like the idea of needing to provide advanced notice; "I mean, it is important, you need an interpreter at the last minute, but who says if I don't ask with at least three days advanced notice, that it doesn't matter?" However, she also understands that there can be consequences when advance notice is not provided; "You know, and I do admit that sometimes I ask for interpreters at the last minute. There has been a few times when I didn't get interpreters, and I know it is my fault because I didn't ask ahead of time." Ms. Lundy's biggest concern however appears to be that without a bright line there will be too much confusion: "now it is very ambiguous . . .I am afraid it is vague, it is going to cause some major misunderstandings." She therefore concludes that "I think it needs to be put back to a three-day time limit, a three-day notice that you need an interpreter. That needs to be back."

Marcy Colton, Deaf Community Advocacy Network (DEAF C.A.N!) (W-234), Notes that "As an agency that provides interpreting services, we receive same day requests almost daily. While this may not be considered reasonable, people have emergencies, get sick, appointing authorities forget to secure the services of a certified Interpreter, etc." She indicates that CAC tries to find an available interpreter regardless of how little notice they have. She describes the agency's philosophy as being; "We cannot penalize the Deaf, Hard of Hearing or DeafBlind person in these situations. It is hoped that every attempt will be made to provide reasonable notice (a week or two weeks even), but even reasonable notice is no guarantee that an Interpreter is available due to scheduling, other commitments, long term assignments (colleges, schools, etc.). And who ascertains reasonable? The appointing authority or the Deaf, Hard of Hearing or DeafBlind individual? Therefore it is our believe that every attempt should be made to secure an Interpreter."

Response: <u>Rule 4 has been amended.</u>

Increasingly, the old model where an appointing authority was required to get a list of interpreters and then contact each individually (without cell phones or email) is being replaced with an agency model. Appointing authorities, even those with favored interpreters they employ themselves or contact directly first, now often have contracts with one or more agencies. As such, the work of "attempting to locate an interpreter" is now a single phone call to a dispatch-type number. How much advance notice is reasonably required if it is only to provide the time necessary to make a phone call? With the comparatively recent availability and growing usage of video relay service, it has to be asked how an office that uses a system that provides interpreters 24/7 could claim 3 days, or any prior notice requirement at all, would be reasonable.

Changes have been made to the proposed rule to reflect the suggestions received during the comment period. They do not, as Ascension urged, reinsert a bright line defining reasonableness as three days. Ms. Lundy correctly notes that the clarity of such a rule would have its own advantages, but it is less persuasive than her questioning "who says if I don't ask with at least three days advanced notice, that it doesn't matter?" It is not believed these rules should presume to do so.

The changes do, however, address Ascension's underlying concern about what this means when a patient decides to stop by urgent care for a cold. The proposed language clarifies that reasonable notice relates to the appointing authority's "obligation to make timely and appropriate attempts" to provide the requested interpreter. As such, the urgent care facility would in fact be expected to make appropriate attempts to provide the required accommodation, possibly including utilizing VRI technology if it is on site and/or calling the center's contract deaf interpreter agency if it has one.

LanguageLine's request that there be no indication in the rules that advance notice is required is also rejected. The term is in the statute, and it is important for these rules to put the term into context and provide a structure for determining whether an appointing authority's requirement for prior notice is not reasonable. Additional framework for determining reasonableness is provided, specifically including the availability of VRI. Finally, LanguageLine's stated concern, that the rule will be abused by appointing authorities to improperly deny interpreters or VRI based upon a lack of notice rather than a lack of availability, is addressed. The proposed rule's language clarifies that the law treats the spurious use of a baseless notice requirement as the denial of a legally-required accommodation.

PART 2. MINIMUM CREDENTIAL REQUIREMENTS AND LEVELS

STANDARDS:

Rules 21 through 26 together provide a structure for recognizing that different interpreting assignments carry different levels of complexity and risk. Complexity relates to the actual nature of the communication being interpreted, whereas risk concerns the dangers that may be present should there be interpreter errors or if the interpreter otherwise fails to establish effective communication. Areas with greater levels of complexity and/or risk require greater skill levels from those who wish to be recognized as qualified to work in them.

As described in the introductory section of this report, Rules 21-26 are intended to ensure for the d/db/hh person, as well as all others involved in a communication, that a given interpreter possesses the necessary skills so that the interpreting provided may be confidently relied upon. This also minimizes the risk that an interpreter will have to break off a communication because they discover they are unable to be effective in a situation they lacked the experience to foresee. The existence of the progressive credential levels and their description in the rules also permits an appointing authority to determine the level of interpreter that will be needed without having any independent knowledge of interpreting.

Rule 21 defines the certifications that will be recognized in Michigan. Rule 22 then delineates the four "standard levels" for the practice of sign language interpreting in Michigan. The four levels include three areas of general practice requiring progressively more skills from interpreters wishing to work at each level based upon the nature of the work, and a separate area of practice for educational interpreters.

Rules 23, 24 and 25 separately lay out both the nature of the environments that are included and the specific credentials that are to be required for interpreting in them. Interpreters certified at a higher standard level may also interpret the environments included in the lower levels. Rule 23 (Standard level 1) covers "non-complex and low-risk" environments. Rule 24 (Standard level 2) covers moderately complex and medium to high-risk environments as well as the areas of health care, government, employment and finance. Rule 25 (Standard level 3) covers high risk and legal environments. Rules 24 and 25 also contain some specific provisions related to the standard of practice in particular areas like health and legal. This analysis will review the comments received relating to Rules 21-25 together.

Rule 26 recognizes the uniqueness of the skills required of educational interpreters by addressing them separately from the three general standard levels. This report will do the same. This will be followed by an analysis of the comments and suggestions for change pertaining to the remaining rules related to minimum credential requirements and levels.

Suggestions Rules 21-25 (general standard levels, lower or eliminate):

Unlike the educational interpreter qualifications of Rule 26, public comments produced only a few, mostly narrow objections to the general provision of Rules 21 and 22, or to the three standard levels in Rules 23-25.

Tom Hoxie (W-288) and **Steve H. Perdue** of **Grand Traverse Industries' Local Interpreter Services Network** (W-242) raise a concern that having the standard levels in place will present a particular hardship in the Upper Peninsula where they indicate the number of qualified interpreters is very low. They do not offer a specific suggestion for change, but urge a delay in adoption of the rules to provide for alternatives to be considered.

Linda Booth (W-06) and **Melissa Kizer** (W-129)**, both with Deaf & Hearing Impaired Services, Inc. (DHIS),** write separately to recommend that: "Given the current shortage crises and the inaccurate risk assessment built into the Standards, the Standard levels should be removed or if not removed should be recommendations as guidelines."

Response: No change to these proposed rules has been made in this regard.
There is no disagreement that adopting standards of practice that accurately reflect the skill levels required for the assignments interpreters are currently being given will expose the reality that this skill level is not presently a reality for the d/db/hh persons who, when the law requires they be provided an interpreter as an accommodation, are legally entitled to a qualified, effective interpreter. These rules maintain that allowing an interpreter who is not qualified to simply be appointed as though they were denies the parties to the communication the ability to proceed accordingly, and prevents the d/db/hh person who is being provided the accommodation from participating in the determination of what the best alternative will be.

Similarly, while DHIS is no doubt correct that the broad and general risk assessment used is not a precision instrument, it is nonetheless believed that it provides a good basis for requiring greater skills in situations that present greater risks. More important, it must again be noted that removing the standards does not provide students with better interpreters, it simply affixes the label "qualified" on interpreters who it is agreed are less than fully so. The "shortage crises" may in some cases require continuing to use these interpreters, but only by necessity and only while honestly acknowledging doing so falls short of the target.

Suggestions Rule 26 (educational interpreter standard, lower):

The level of skills that should be required in order for an interpreter to be recognized as qualified to interpret in the educational environment were the subject of a very large percentage of the comments received during the public comment period. The sheer volume of comments and the firmness of the convictions with which these opinions are held is eclipsed only by the emotion with which they were often expressed.

The opinions are also divided, though not nearly as much so among d/db/hh persons as between different interpreters, interpreting agencies, and appointing authorities. D/db/hh persons were overwhelmingly in support of the proposed standards. There were a few who maintain that eliminating the qualifications and relying only on effective communication would be more personally tailored to insure quality, but they did not address how this would work for appointing authorities and they were far outnumbered by those who believed the standards were not high enough.

A representative selection of comments related to the standards set for educational interpreters includes:

Jamie Cornell (W-257), **Linda Booth** (W-06) and **Melissa Kizer** (W-129)**, with Deaf & Hearing Impaired Services, Inc. (DHIS),** request that interpreters holding a credential based on the no longer offered QA (Quality Assurance) test be "grandfathered" as qualified to remain interpreting in schools where the 4.0 standard would otherwise be applied. Want to delete R393.5021(i) and further extend the label of "qualified" to persons who still hold the QA in spite of the test having been phased out and not offered for years, and QA holders informed of the need to become EIPA Certification.

Katie Oskam (W-309) is a sign language interpreter who wrote stating: "I think that a goal of a score of 4.0 for educational interpreters is a fantastic goal. I do not believe it is attainable immediately after finishing an interpreter training program (ITP)." She argues these people need experience and recommends that they "be allowed to work with a 3.5. A 3.5 is a good score. It allows for good communication with minimal errors, and the errors do not interfere with comprehension of the message." She concludes: "Making the certification more strict would only worsen the shortage."

The **Michigan Association of Administrators of Special Education[1] (MAASE),** (W-52) which was echoed in the 23 individual submissions from its member schools and administrators,

[1] Where MAASE is listed as having provided a comment/recommendation it should be noted that the same comments/recommendations were also submitted individually by 23 other individuals/organizations. (Bay Arenac ISD; Bentley, Dawn; Cosan, Robert; DiGiovanni, Janice; Friedland-Lovik, Kelly; Heitzman, Daniel R.; Johnson, Peter; Lopucki, Trish; Maas,

significantly did not oppose the 4.0 EIPA score standard outright. Instead it suggests adding a provision that "allows for any educational interpreter to be hired with an ElPA score of 3.5 or higher on a temporary certificate with the provision that he/she have three years from the date of their test to meet the 4.0 standard. A temporary certificate would allow interpreters to work for three years as they continue to improve their skills."

The Michigan Department of Education, Office of Special Education MDE/OSE (W-115), as well as **Nancy Mosher** (W-168) who formerly worked in the Department but is writing in a personal capacity, similarly "continue(s) to advocate for a provision that allows any educational interpreter to be hired with an EIPA score of 3.5 or higher on a temporary certificate with the provision that he/she would have three years to meet the 4.0 standard." OSE argues: "A provisional certificate would allow interpreters to work for three years as they continue to increase their skills."

Erin McCarthy (W-305) also recommends "new interpreters testing between EIPA 3.5-4.0 be allowed to be hired and given a few years to raise their EIPA level. This is seen in other professions such as counseling and medicine, with new interns gaining access to provisional or limited licenses."

On the other side of the coin:

Sarah Houston (W-318) noted that she was a child of deaf parents (CODA), the mother of a deaf son attending the Michigan School for the Deaf, and most important for these purposes a certified interpreter working in the Flint schools. She urged that "we do NOT need to lower our standards in the classrooms. A 3.5 EIPA score is equivalent to a C on a grading scale. I for one as a parent do not want someone who can only relay some of the information to my child. I want and need for my child to get ALL the information he is ENTITLED to receive just like the hearing kids in that class are getting. There are some of my colleagues who are asking for it to be lowered to a 3.5 with no need to retest. Well my thoughts and comments on that is those colleagues have had 7 years to increase their skill level. If they haven't done so by now maybe they need to find another profession, we don't need stagnant interpreters with no motivation to improve their selves."

Pam Klock (T-17), the parent of a deaf 17 year old, told us in Flint she had read many of the comments that suggest "allowing educational interpreters a grace period to get the EIPA 4.0; yet none of those address the concerns of our child's education during that three-year improvement phase." She was not persuaded, telling all those at the hearing that "we are not willing as parents to put our child's education on hold for any length of time while people are brought up to speed."

Millie Hursin (T-43) had this to offer in Flint: "I am an educator, over 30 years experience, retired teacher and school administrator. We know the State of Michigan and MBA requires teachers to have higher certification. They must be highly qualified. If they are not, they can't teach. We also know that if teachers want to teach math, they must have an endorsement to teach math. If they want to teach chemistry, they must have an endorsement to teach

chemistry. Our interpreters, on the other hand, they want not to have these requirements. They want to have an EIPA of 3.5. They want to have time to learn to improve their skills. They want to have time to go from 3.5 to a 4.0. They want time for that. We don't give teachers time to get their endorsement. If they don't get their endorsement, they are out the door. These interpreters, they want to go from a 3.5 to 4.0 over a couple years. At whose expense? At our children's expense."

Natalie M Grupido (W-126) writes "I truly find it to be quite astonishing that the State of Michigan would consider 4.0 as a level for interpreters. This is a "b" average skill which is average. The highest EIPA rating would be 5.0 and for people to ask to lower it to 3.5 does a lot of disservice meaning that it is acceptable to give Deaf, Deaf-Blind, and Hard of Hearing students mediocre language accessibility. This in itself is an outrage. Each student should have complete accessibility and this state of Michigan should change the rating to 5.0 instead of 4.0."

Response: No changes to Rule 26 educational interpreter qualifications have been made. Possession of a QA has been shown not to ensure an interpreter is qualified to work in an educational setting, and if the QA holder is qualified they should not have difficulty establishing their qualifications via EIPA testing. The test itself was terminated by the Division in November of 2012 and it has not been offered since. QA certificate holders have been permitted to renew their certificates, but have also been informed that renewal would terminate as soon as the rules permitting the Division to do so could be passed. There can be no legitimate reason for these interpreters to remain in the classroom if qualified interpreters are available.

Lowering the EIPA test score necessary to be certified as qualified is, for the reasons discussed in the introduction and above, not believed to be an appropriate response to a current lack of interpreters.

The suggestions from MAASE, OSE and Ms. McCarthy for the creation of some sort of "provisional certificates" are at first blush quite appealing. However, the reality is that while it is understandable to want to provide support, particularly for recent graduates from interpreter training programs, simply permitting a 'nearly qualified' interpreter to practice their skills on students until they get good enough to actually qualify for the job is not the answer. Again, in instances where there is a shortage of qualified interpreters, a recent program graduate with a 3.5 score may well be the best available accommodation, and if so it would be provided. That decision must, however, be made based on the interests of the d/db/hh child, not those of the interpreter candidate.

Suggestions Rules 23 and by implication 26 (educational interpreter standard, broaden):

There is one more suggestion that directly relates to the general issue of standards and qualifications.

Karen Young (W-161) and **Sue Post** (W-147) take a different approach to defining the appropriate qualifications for educational interpreting. They seem to suggest that all focus be placed on the vocabulary and material being covered. Standard Level 1, they note, permits interpreters to interpret in situations including VRS in which an interpreter must "deal with regional signs or minimal language skilled speakers," "unknown topics," a "quick pace" and for

which, unlike classroom work, "there is no prep time involved." How, they wonder, can the rules provide that a Standard 1 interpreter is qualified to interpret "advanced bio physics at the collegiate level" but at the same time hold that "they are not qualified to interpret Kindergarten." They thus propose providing that Standard Level 1 interpreters be designated as qualified for all K-26 educational settings.

Response: No change to Rule 23 Standard Level 1 has been made.
This suggestion seems to have been foreseen by **Megan M. Seipke-Dame,** an educational interpreter whose written comments (W-310) provide a detailed answer to the question that is recommended to anyone who is interested. Simply put, the answer is that educational interpreters are covered by a rule separate and apart from the skill/risk-based hierarchy of the standard levels. As Ms. Seipke notes, "linguistic needs in the schools are far greater than those out in the community and those needs require interpreters with specialized training to meet them." The function of an educational interpreter is different than any other, the skills and knowledge required are different, and thus so is the training and testing. In addition, the VRS interpreting the site is done using a technology that permits its adult users to switch interpreters as desired simply at the push of a button. This allows the users to self-correct when they believe a particular interpreter is insufficiently qualified or effective. The younger the student, the less likely he or she is to even understand these concepts, no less possess the ability to challenge the interpreter selection.

OTHER PROVISIONS:

In addition to those focused on the standards themselves, other suggestions related to the specifics of the individual rules were also received:

Suggestion Rule 21, (provide for recognizing new tests):

Bethany McLain, Sign Language Services of Michigan (W314); **Daniel McDougal, Department of Sign Language Studies at Madonna University** (W-181); and **Sandra Maloney, MIRID** (185) all suggest the addition of a provision that would expressly enable the division to recognize new tests and certifications. They note that new tests are being developed by the industry and that sometimes test names change. They want to ensure that there is some flexibility for the division to adapt.

Response: No change to Rule 23 has been made.
The division agrees that this flexibility is important, but asserts that it is already provided for. Subsection (d) of this rule provides for the recognition of "equivalent certification" to be recognized.

Suggestions Rule 23 (remove VRS from level 1):

Jennifer Doerr, Mott Community College (W-383), objects to including Video Relay Service (VRS) interpreting as a standard level 1, low-risk environment. She describes VRS as some of the most challenging she has done.

Mark Halley (W-300), notes that "postsecondary education is not, by any means, noncomplex" describing how in his own practice he has "interpreted topics ranging from the quadratic equation and Socrates' view on life to chiral carbon atoms and pseudostratified squamous ciliated epithelium." He also adds that VRS is similarly not noncomplex.

Jillian Gruetzner (W-268) echoes the suggestion that qualification for college interpreters should not be in level 1, suggesting instead that it should be at least as high as secondary and elementary. Ms. Gruetzner also creatively suggests requiring endorsements for interpreters in medical and legal courses.

Response: No change to Rule 23 has been made.
Certainly the category of postsecondary education covers a great deal of ground. In reality it is so broad that it is not possible to provide for detailed "qualifications" that would apply, especially as subject matter is often more relevant to the difficulties an interpreter might face than are simple designations like sophomore, senior, or grad student. Chemistry at any level might present challenges, for example, that history at an advanced level would not. These rules thus treat postsecondary education as more of an effectiveness concern than one about qualifications. A BEI-1 possesses the skills generally necessary to interpret for another adult in a classroom setting. The material may be "complex" or specialized, but the setting is less so. Critically, and unlike elementary and even high school, students are generally of an age and maturity where they can more reasonably be expected to recognize and raise concern about an interpreter who is not being effective.

Suggestion Rule 23(1)(c) and 24(1)(d), (clarify standard level re: DI):

Sandra Maloney, MIRID (185) notes that both standard level 1 and standard level 2 list "DI" as an acceptable credential. She queries: "Which level should it fall under?"

Response: Rule 23(1) has been amended to delete former subsection (c).
Ms. Maloney is correct in noting that because Rule 24 both recognizes the DI and provides at subsection (4) "Standard level 2 interpreters may interpret for a proceeding for standard level 1 environments," it is redundant to list the identical credential in both places. 23(1)(c) has been deleted in the proposed draft.

Suggestion Rule 24(2)(a), (allow educational interpreter for IEP meeting):

MAASE (W-52) and **Karen Young** (161) request a change to the provision in Rule 24(2)(a) that provides a standard level 2 interpreter is required for IEP (individualized education program) meetings. They indicate that this puts a burden on schools that have educational interpreters because many who interpret in education do not also pursue other certifications. They assert that the educational interpreter "is able to provide adequate communication about the educational setting and IEP document and process."

Response: No change to Rule 24(2)(a) has been made.

As **Millie Hursin,** MA.EDL, NAD V (W-270) stated in a reply to her "honored colleagues [at MAASE] who have knowledge of the logistics of special education but not the needs of the Deaf community" and in much the same way that it cannot be assumed even the most qualified non-educational interpreter can simply step into a classroom, an educational interpreter is not qualified by virtue of their training, testing and certification to interpret in what is a medium to high-risk environment. The IEP meeting is an often emotionally charged, always quasi-legal, event involving at least a handful of people. While the educational interpreter's experience in the school and familiarity with some of the IEP process might be helpful, it is not sufficient. Additionally, if the interpreter is there to support a student's communication and understanding of the meeting, they cannot also do the same for everyone else.

Suggestion Rule 24(5), (interpreter for overnight hospital stay):

Linda Booth (DHIS) (W-06) takes the position that the draft Rule 24(5) gave insufficient weight to the wishes of the d/db/hh person and their "expectation of equal access needs." Her concern is that medical complications do not wait for daybreak, and because events are unpredictable, the d/db/hh person is entitled to an interpreter in case they wake. Ms. Booth also attaches a letter from her counsel explaining that the draft of this rule in particular, by suggesting the possible use of "alternative accommodations," crosses a line into suggesting that the rule authorizes an accommodation less than the one the ADA (or other state/federal law) requires. She further suggests that the provision, though well-meaning, oversteps the division's legislative mandate, which applies after the decision to provide an interpreter is made.

Ascension Health (W-85) believes that the term "preference" creates an imbalance toward the individual d/db/hh person and requests that it be changed to "consideration" or indicate that the appointing authority shall consult with the person when determining whether an interpreter is required. They argue that this suggests the d/db/hh individual has the ability to demand an interpreter not already provided for under the ADA or other laws.

Response Rule 24(5) has been deleted.
The draft rule's focus was outside the scope of these rules and was therefore deleted.

Suggestion Rule 26 (Educational interpreter written assessment):

Erin Seipke-Brown (W-276), an educational interpreter with 14 years of experience, notes that the draft language requiring " '…passage of a written assessment' is vague" and asks that the rules "[d]efine which written assessment is expected." "EIPA written assessment should be the express and expected written assessment for all K-12 educational interpreters, as it tests all content areas in which educational interpreters should be well versed and competent."

MAASE (W-053) requests that: "If a written assessment is required, the DODHH must offer the test. Passage of a written assessment should be required after August 31, 2016."

Many other comments generally referenced the addition of the EIPA written test and the additional expense and inconvenience it created for persons who already hold the relevant EIPA

score and are certified and have been working in the schools. Others mentioned the difficulties that could be created by large numbers of persons taking the test at the same time, the current shortage of available testing locations (which is due in part to lack of demand because it is not required), and/or the lack of time to prepare for the test.

Response: Rule 26 has been amended to specify written test and delayed effective date. The draft rule has been changed to specify that the written assessment to be required is the EIPA written test or similar written test adopted by the Division in cooperation with the MDE. In recognition of the other concerns, the requirement for a written test will not apply to those certified with the Division as having obtained the required 4.0 prior to August 31, 2016 for elementary and 2018 for secondary.

Suggestion Rule 26 (delineation of elementary/secondary endorsements):

MAASE (W-052) requests "some flexibility" be added to the rules distinguishing the requirements for elementary or secondary certification by allowing persons holding either certification to interpret in either educational setting. They argue that doing so "would allow for school districts to meet changing needs of the student population and respond to these needs in a timely manner."

Sue Post (W-147) also urges the elimination of the primary secondary distinction.

Response: Rule 26 has been amended to allow either certification in secondary setting. The idea that the elementary and secondary certifications are interchangeable is belied by the very fact that there is a need to differentiate between them in the first instance. As noted by **Pam Klock** (T-17), "Boys Town, who administers the test, developed two separate and distinct platforms because students in elementary and secondary settings have such vastly different educational and language needs." These rules recognize educational interpreters as different from other interpreters based upon considerations like the unique linguistic needs of youth, the need for an understanding of language acquisition and development, and knowledge of how d/db/hh youth are often language-delayed because they do not have the same opportunities to observe and absorb others communicating as hearing youth do.

While the need for some flexibility is warranted, as with the availability of interpreters in general, it must be exercised with prudence. The importance of developing language skills is greatest for children in elementary settings. As basic skills are developed, so are the abilities to adapt and express individual needs. For these reasons these rules generally permit more 'flexibility' in secondary (and a great deal more in post-secondary) educational settings. With regard to the specific request from MAASE related to elementary and secondary certifications, Rule 26 has been amended to allow either certification in the secondary setting, but no change has been made to the requirement that interpreters in the primary setting must obtain primary certifications.

Suggestions Rule 26 (Substitute interpreters):

MAASE (W-053) requests that the rule be amended and language should be modified to provide for the use of substitute interpreters with credentials that would not qualify them to be permanently assigned. They ask for standards to apply equally in elementary and secondary environments. For absences over 20 days they recommend the rule permit EIPA 3.5, Michigan BEI II, or minimum standard level 2 or 3. For absences of 20 days or less, they request a Michigan BEI I, EIPA 3.0, or minimum standard level 2 or 3.

Erin Seipke-Brown (W-276) agrees the rules should define substitute interpreter requirements for secondary and elementary equally, however she urges higher requirements for both.

Response: Rule 26 was amended.
In what is now 26(4), the differentiation between long and short term substitutes was adopted, as was the request for greater flexibility in who qualified to act as a substitute interpreter. However, consistent with the Rules' overall intent to ensure that the greatest emphasis on interpreter qualifications and effectiveness must be placed where it is most critical which in the educational setting is the elementary level - the rules provide increasing flexibility on a graduated basis, permitting it first in the secondary setting.

Suggestions Rule 26 (4)(j) (educational interpreter at certain proceedings):

MAASE (W-053) objects to the requirement that an educational interpreter may not be used alone for the listed proceedings, stating that districts should only be responsible for providing the interpreter certified for the education setting.

Response: Rule 26 was amended.
For the reasons stated related to Rule 24(2)(a), an interpreter must be qualified for the proceeding that is taking place. A child's involvement may warrant an educational interpreter, but legal or medical proceedings need the proper person based upon complexity and risk. However, in this instance it is recognized that one interpreter may hold both qualifications and the proposed rule has been amended accordingly.

Suggestions Rule 26 (clarity/technical changes):

MDE/OSE (W-115) and **Nancy Mosher** (W-168) were among those pointing out that "Business day" is not a term used in schools and will cause confusion. We suggest you measure the time in school days."
MDE/OSE (W-115) also requested changing "pre-kindergarten to 6th grade" to "prekindergarten through 6th grade."

Response: Rule 26 was amended.

Suggestions Rule 27(3) (Exceptions):

MAASE (W-053) objects that the draft rule appears to grant sole discretion to the Division and argues that "the decision to determine if an exception is granted should not be made by a stand-alone individual from a single organization."

Linda Booth, (**DHIS**)(W- 009), writes that there need not be any formal exemption or exemption process. She maintains that the ADA process requires hiring the most qualified interpreter available and this should be sufficient. "As long as reasonable attempts were made to acquire the most qualified interpreter available, the requirement would be met." She thus urges the rule's deletion.

MAASE (W-053) objects to 27(3)(a), arguing that "compensation is solely the responsibility of the school district to determine. An outside agency cannot have the authority to determine what is "competitive". "Division assistance" is not defined and should not be included without clarification.

MDE/OSE (W-115) objected to subsection (3)(c), pointing out the placement decisions were covered by the IDEA and/or the Michigan Administrative Rules for Special Education (MARSE). They point out that "If there is a disagreement over placement decisions, then the parties must utilize the resolution procedures. Parents do not have a unilateral right to demand a placement and the Division does not have the authority to give that right to parents within the context of the IDEA." MAASE also objected to the implication that parental approval would be required.

MDE/OSE (W-115) requested deletion of what was formerly subsection (3)(d) "because the term 'consent' in this subrule is not in line with the IDEA regulations" which as noted above mandate the process for making these decisions.

Response: <u>Rule 27 is amended</u> to clarify the exception process.
The process for obtaining an exemption is not intended to be a discretionary call left to the division and the rules language has been amended to make this intent clear. A school wishing an exemption must notify the Division in writing of the basis for seeking the exemption. If the Division believes there are qualified interpreters available it will notify the school; otherwise the exemption shall be granted. If the Division supplies names of eligible interpreters and the school instead employs someone else, the school retains the ability to show why the use of the named individual would not have been a reasonable accommodation under a traditional undue hardship type ADA/PWDCRA analysis. In this manner, the rule ensures that the Division is made aware of the need and has a chance to assist (or challenge) the school. If the Division believes there are interpreters available, it notifies the school which is thereby also aware that it may have to defend a decision not to utilize the identified interpreters.

Response: <u>Rule 27 is amended</u> to delete draft subsection (3)(d) and amend what was (3)(e).
It must be noted that numerous individuals who commented specifically noted their support for the draft rules including this "consent" requirement. Many in fact urged that the rule be changed to also include a student's consent. Nonetheless it is concluded that this process is indeed mandated elsewhere. The proposed rule was thus amended to delete the "consent" requirement that was (3)(d) in the draft rule. The language in what is now (3)(d) was amended to clarify that

the intent is to ensure only that all options are discussed and determined using appropriate IDEA/MARSE process, but does not provide parents with a unilateral right to choose or veto any option. However, regardless of the process used, effective communication is still required and no attempt to determine what is effective should be made without the involvement of the d/db/hh student and his or her parents' or guardian's input.

Suggestions Rule 28 (Special endorsements):

Linda Booth, DHIS (W-006), opposes the endorsements. She asserts that in a medical situation "the interpreter is simply required to communicate to the patient what the doctor is trying to tell them. Hearing patients are not required to understand medical vocabulary for the doctor to communicate with them; the doctor is required to explain to the patient in laymen's terms, with the possibility of some simple education to the patient at best. This same communication is what should be accomplished with the interpreter, no differently than the doctor would communicate to a hearing patient." She writes that DHIS recommends that the endorsements be stricken from the rules or be made a recommendation.

Grand Traverse Industries' Local Interpreter Services Network (LIS'N) (W-241) opposes the endorsements, again stressing that the shortage of qualified interpreters is magnified in the Northern Lower Peninsula and the Upper Peninsula, and asserting that requiring these endorsements will leave Michiganders living in these areas without access to interpreter services at all.

Cindy Stemple (W-281) writes: "Requiring endorsements for medical settings two years after the rules are promulgated is not enough time for us to satisfy the requirements and what happens to services in the interim?"

Robert J. Cosan, Gratiot/Isabella RESD Associate Superintendent for Special Services (W-236), is particularly concerned about the endorsement and requests that the rules provide that "educational interpreters working with Deafblind students will not be required to have the endorsement."

Sandra Dodd (W-90) indicates that as a child of deaf adults (CODA) "who did not go to college to learn this profession", the prospect of having to take a test of English proficiency and be tested on medical terms/procedures "really frightens" her. She does not understand why the endorsements are necessary and asserts that the "hardship and stress that these endorsements will create" will be "overwhelming." She recommends the endorsements stricken.

Response: No change to Rule 28 has been made.

Hani Adams (T-46, W-347), **Laura LaBudd** (T-66), **Kevin Morrison** (T-15), **Janice Murray** (Video), **Pat Riley** (W-98) and **Gwendolyn Thorpe** (T-87) are just a few of the many individuals who used the public comment period to share personal stories of hardships suffered as a result of having been provided interpreters in medical and legal settings who were not up to the task. The consequences of miscommunication in these areas can be life changing and

potentially life ending. Even something as seemingly small as ensuring an interpreter who wishes to work in a medical setting knows to pay special attention to the difference between the phrases "your cancer test results are back and they look positive" and "your test results are back and you tested positive" should be sufficient to require a recognition that some specialized knowledge is warranted, and endorsement is the only way that either doctor or patient can ensure an interpreter has it.

It is believed the endorsements are necessary based on the comments we have received and stories we have heard; the risks and costs of errors are too high not to include the endorsements. The rules will not cause anyone to do without an interpreter, but they do function to assure that if one or more qualified and endorsed interpreters is available, one must be used. It also ensures that if no such interpreter is available, the d/db/hh person and doctor are aware that one is not being provided.

The rules do not take likely the additional work that the initial and/or continuing education will require, but in the end it is believed that these limited areas, the special knowledge and/or increased risks more than justify it. Additionally, it should be noted that the responsibility that comes with being relied on to accurately interpret in a medical or legal situation should itself be stressful. The endorsements included in the proposed rules are supported by interpreters like **Jeff Plaxo** (W-315), who wrote "I am also in support of the endorsement requirement for the situations specified in the proposed rules and regulations. Too many times I have been partnered in legal and/or medical situations with someone who is in over their head and unqualified. These situations put the Deaf or Hard of Hearing person at an unnecessary risk. These situations also put myself and my profession at risk."

The request that the d/b endorsement requirement be waived for educational interpreters is not specific as to its motivation, but it is expected the concern may be based on a mistaken belief that the rule will affect all persons involved in communicating with deafblind students. There are many deafblind students who face other challenges as well, and some may lack the ability to acquire sufficient language skills for an interpreter to be appropriate. It is not necessary to expound on these instances here, because the Interpreter Act, and these rules, apply only when an interpreter is to be provided. However, once that occurs, the proposed rules do require an interpreter being provided to a deafblind student must be qualified to interpret for deafblind persons.

Both the **Michigan** (W-185) and **National** (W-212) **Registry of Interpreters for the Deaf** (RID) organizations support the special endorsements. So do the proposed rules.

PART 3. PROCEDURES FOR APPLICATION, CERTIFICATION, AND LISTING

Suggestion Rule 31 (exempt out of state interpreters who do VRI interpreting in MI):

Rule 31(1) provides that the division "shall certify and list an in-state or out-of-state applicant." **Mark Conroy, Language Line Solutions**, (W-179) , contends that: "If VRI interpreters are required to have state certification in addition to their national certification, it would create an unnecessary burden on those interpreters whom are based outside of MI. This requirement would limit the availability of VRI interpreters allowed to interpret for MI's deaf and hard of hearing population." He therefore requests that we consider exempting out of state VRI interpreters from any state certification or registration requirement, provided that they meet the other standards.

Response: No change to Rule 31 has been made.
First, yes, the proposed rules do contemplate that VRI interpreters, wherever they may be, are required to be registered in Michigan. The division will look at ways to minimize the "burden" this might cause to a VRI business with many employees, by examining the possibility of allowing the company to process the information on behalf of employees. However, to the extent that any burden is placed on a company that, like LLS, is located in California, it is no different than that which is placed on similar companies located in Michigan.

It must be stressed that the Interpreters' Act mandates that whenever the law requires an interpreter be provided to a D/DB/HH person in Michigan, it must be a qualified interpreter. The legal duty is placed on the appointing authority, who is the person or entity providing the service for which the interpreter is required. The appointing authority is thus by definition providing the service and the interpreter in Michigan. The fact an appointing authority may choose to go out of state to procure a video interpreting service does not relieve them of their legal responsibility to ensure it is providing an interpreter in compliance with Michigan law. These rules define qualified and make it possible for out-of-state VRI interpreters to meet the definition in the same way as VRI interpreters located in Michigan. There is no additional burden placed on an out of state VRI provider not also placed on an in state one.

In addition to establishing and verifying the qualifications of interpreters providing services in Michigan, the Interpreters' Act instructs that the rules provide "minimum standards of practice" and should those be violated procedures for "revocation, suspension or limitation of certification." The division cannot fulfil this part of its mandate unless the certifications held by VRI interpreters providing services in Michigan are Michigan certifications.

Suggestion Rule 31(3)(d) (incorporate educational interpreter ethics code):

The **Michigan Department of Education, Office of Special Education (OSE)** (W-115), urges that the rules provide that, in addition to including a statement affirming that the applicant will comply with the NAD-RID code of professional conduct, the sworn statement which must be

provided by a person seeking interpreter certification include, a statement affirming that the applicant will comply with the "EIPA Guidelines of Professional Conduct for Educational Interpreters"

Response: Rule 31(3)(d) has been amended.
It adds the "EIPA Guidelines of Professional Conduct for Educational Interpreters."

PART 4. PROCEDURES FOR TESTING

No substantive comments or requests for changes to Part 4 were received.

PART 5. MINIMUM STANDARDS OF PRACTICE

Suggestions Rule 51 (Practice within standard level)

Mark Halley (W-300), suggests that 51(2) be changed so that an interpreter shouldn't have to show credentials at every proceeding with the same individuals.

Ascension Health (W-085), is concerned that 51(8)(e) appears to require that any time a D/DB/HH participant requests an interpreter; it must be via a team, which would not be current practice. They suggest clarifying such to reduce confusion.

MAASE (W-053), and **Karen Young** (W-161), recommend that 51(10) be changed so that an educational interpreter be permitted to interpret in the named situations. MAASE notes it also raised the same objection to that it raised to 26(4)(j) that School districts should only be responsible for providing the interpreter certified for the educational setting.

Karen Young (W-161), asks that 51(9) exempt educational interpreters from rule requiring interpreter to sit out if they believe effective communication requires a team. "If they feel as though the job requires two interpreters based on their professional expertise they should be permitted to suggest such accommodations to the appointing authority prior to accepting the assignment, but should not be allowed to knowingly accept a job and then sit out for a day."

Response: No change to Rule 51 has been made.
It is believed that 51(2) should remain the usual/default practice. The d/db/hh person, appointing authority, or any other party can always direct otherwise, but doing so should be at their discretion. This allows for fact that same interpreter can be used in multiple settings with different qualification requirements, and/or that a party has memory difficulty. It should be noted that pursuant to 51(3) this practice does not apply to an interpreter working within a school.

This provision in 51(8)(e) only applies when the request is for a deaf interpreter. As a deaf interpreter is requested by a d/db/hh person who is unable to communicate with the provided interpreter, but the deaf interpreter themselves cannot communicate vocally. Thus a team is required.

In Rule 51(10), as with Rule 26, the situations described are not educational and therefore require that the interpreter should be qualified based on the nature of the communication involved. Legal medical need proper interpreters based upon complexity and risk. While the events may happen at school and involve school officials, "medical, mental health, police and legal situations" are nonetheless medical and legal in nature and require an interpreter with the appropriate qualifications.

Rule 51(9) is does not enable an interpreter to knowingly accept a job and then sit out the day, but neither can it compel an interpreter to continue interpreting when they are asserting they cannot do so effectively. When an interpreter asserts that a team is necessary in order to interpret for a situation the appointing authority can certainly look for alternatives like changing the structure of a proceeding to include more breaks, or fewer people. What an appointing authority cannot be permitted to do is to merely compel the interpreter to violate their obligation to refuse to provide what they believe to be ineffective communication, and it is appropriate that the rule say so.

Suggestions Rule 52

Ascension Health (W-85), suggests the language referencing the documents adopted by reference be amended so that they are adopted "as amended from time to time."

Response: No change to Rule 52 has been made.

MCL 24.232(4), permits the adoption of a matter by reference, but provides: "The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor."

Suggestions Rule 54(3)

MAASE (W-053), requests that the requirement for a minor's parent or guardian to give permission for the use of a student interpreter be deleted. They note that school settings do not require supervising teachers to obtain consent for intern teachers.

Jillian Gruetzner (W-268) on the other hand not only supports parental consent, she urges that the student's input should also be required. She points out that hearing parents who do not sign may lack sufficient communication with a child to understand the child's needs on a subject like the importance of the interpreter relationship.

Response: No change to Rule 54(3) has been made.

The analogy to intern teachers is not germane. The intent of this provision has nothing to do with students; it applies to adults in all areas where interpreters may be provided as an accommodation. The provision applying to students merely provides that when a d/db/hh is a minor, their consent is obtained from the parent or legal guardian. It is inappropriate to suggest that a student with a legal right to a qualified interpreter can instead be provided with a supervised, but certainly not qualified, student interpreter without the agreement of the person responsible for protecting that right.

Suggestions Rule 54(6):

On behalf of **Lansing Community College's Sign Language Interpreter Training Program** (W-043), **Brenda Cartwright**, requests elimination of the portion of Rule 54(6) providing that only qualified interpreters with EIPA, national, or level 2 and above certification may supervise interpreter program student interns. She writes: "We feel strongly educational institutions should

retain academic authority over our students' clinical experiences. The Division on Deaf and Hard of Hearing has been given no power to regulate student interpreters. Interpreter educators have the expertise to select supervising interpreters, and will do so carefully and deliberately."

From the **Oakland County Community College Sign Language Interpreter Program** (W-196)**, Kelly Flores** and **Joanne Forbes** also request omitting the limitation on who can supervise and trusting that schools' "Interpreter education programs have criteria for selecting supervisors for their students" and that the criteria "provide students with the best possible internship placements."

Jennifer Doerr (W-283), also works for an Interpreter Training Program, and also objects to limiting the certification levels of to be required of mentors. She feels strongly that "educational institutions should retain academic authority over our students' clinical experiences. Interpreter educators have the expertise to select supervising interpreters, and will do so carefully and deliberately."

Each of the above stresses the need to provide an educational pathway to certification for those who wish to become interpreters, and that doing so is in the interests of the d/db/hh population in Michigan who are underserved when there are insufficient numbers of qualified interpreters available and will remain underserved if impediments are placed in the way of educating future interpreters. They argue that limiting the programs' ability to choose supervisors will severely limit the opportunities for student interpreters to receive supervised clinical practice.

Response: No change to Rule 54(6) has been made.
The Interpreter Act does not provide for, nor are these rules intended as, regulations on Michigan's Interpreter Training Programs. The Act does, however, require the determination of appropriate standards of practice for interpreters, including the determination of what qualifications are required in order to interpret in a given situation. One such determination is what skill level should be required before an interpreter is permitted supervise interns.

It is respectfully submitted that comments offered by the training programs actually reinforce the division's concern. Each points out that the schools should retain academic authority over <u>their</u> students' clinical experiences. These are not only students the rules need to protect. Interpreter students can learn a great deal from their mistakes, but while these are clinical experiences for the student interpreter, they are critical early learning and language acquisition and development years for the student in the elementary school where the interpreter in training is placed. Even when not in a school setting, an Interpreter Training Program's primary concern in their student may not always be consistent with that of a given d/db/hh individual or supervising interpreter. It should be kept in mind that an interpreter supervising an intern is still responsible for ensuring that the communication is effective, including the accuracy of all content being signed and spoken by the intern. A supervising interpreter thus needs the skill to simultaneously provide guidance and scrutinize, as well as the judgment and confidence to correct, or even replace, the student at any moment. This is a level of skill that exceeds that required of a level 1 interpreter.

Although an interpreting student may be interpreting in a level 1 setting, the added duties and responsibilities assumed by the interpreter who is mentoring quite literally raises the complexity and risk involved sufficiently for the rules to treat mentoring as requiring a level 2 interpreter.

55 VRI standards;

Suggestions Rule 55(3)

Ascension Health (W-85), pointed out that there are instances where state or federal law specifically exempt medical facilities from the need to even inform parents of tests or treatments to minors (mostly things like STDs where the government has decided parental notification would prevent kids from seeking needed medical attention).

Response: Rule 55(2) was amended.

In these instances a child very well might want to insist on VRI rather than risk a local interpreter who their parents knew, and it was never the intent that these rules require that hospitals get parental approval for VRI on something they were not to inform parents about in the first place. (Subsection now appears as Rule 55(3))

Suggestions Rule 55(7)

Suzanne Dunleavy, LSA video (W-294) challenges draft Rule 55(7)'s requirement that a VRI interpreter interpreting for a proceeding in Michigan also demonstrate he or she possesses a valid license or certification from the state in which he or she resides. She notes that; "In order to become registered in Michigan, out of state VRI interpreters have already had to demonstrate they are qualified by presenting their current RID membership card (listing RID certifications on it)." Why would they be required, she asked, to then show BOTH their valid Michigan and out-of-state credentials? She asked that this unnecessary extra burden not be placed on non-Michigan VRI interpreters.

Similar concerns were submitted by **Sandra Maloney, MRID** (W-185 and **Janet Jurus** (W-185), who also ask that 55(7) be stricken.

Response: Rule 55(7) was deleted.

Suggestions Rule 55(8)

Ascension Health (W-85), objected to the draft language in 55(8) stating that "A D/DB/HH person who in good faith asserts VRI is not effective communication shall not be compelled or coerced to use VRI…" They request the wording be changed to "asserts VRI is not effectively providing communication." They maintain that the draft language allows individuals to decline VRI based upon bad experiences with different and often much older technology that may not have worked as well as what is being offered, or even based upon stories they have heard rather than on personal experiences. They assert that the rule should make it clear that an individual should at least try the technology being offered before declining its use.

Response: Rule 55(8) was amended.

The language in what was 55(8) was changed in order to address the concerns expressed, but it was not changed to the extent requested. The proposed rule clarifies that a hospital can reject a demand it believes is not in good faith, but it will not go as far as limiting objections only to when VRI is already being used and is not "providing" effective communication.

The language has been changed to more clearly state that a d/db/hh person objecting to VRI must have a "good faith" basis for doing so. In particular, it changes "asserts VRI is not effective communication" to "asserts that VRI does not provide them with effective communication" to clarify that the objection needs to be first person. It also provides additional examples of what "good faith" means, thereby further clarifying that such exceptions are based on personal experience with similar equipment, or personal needs/conditions that would apply to any equipment.

Far too much of what was offered during the public comment period consisted of personal experiences of individuals who were compelled to "try it" when they had limited use of their arms, limited vision, and/or had problems with the same equipment the day before. A rule that would expressly provide that a d/db/hh person who cannot adequately make out the picture on the big screen TV at home must arrive for treatment and try the VRI before their objection should be taken seriously is not an acceptable option. The desire to require that a patient "retry" VRI after they assert it previously didn't provide them with effective communication is understandable, but the time wasted while not looking for an interpreter is not justified by the remote chance the patient will be satisfied with the communication (as opposed to simply worn down enough to 'make do').

No single concern was expressed more frequently or with more passion than that VRI was being "forced" on d/db/hh persons for whom it was not effective. VRI, at least in its present form, is a wonderful temporary and/or emergency tool, but for most (if not all) it is at best a poor substitute for a live interpreter when effective communication is as important as it is in medical settings. It is based upon this testimony that while the language in what had been 55(8) has been amended to ensure that it is not abused by individuals who have no good faith basis for objecting to VRI, it is also moved up to be 55(1) in order to also make it clear the importance of paying head those whose objections are. (Subsection now appears as Rule 55(1))

Suggestions Rule 55(9), 55(10) and 55(11):

Suzanne Dunleavy, LSA video (W-294), objects to the various provisions in 55(10) individually, but each for similar reasons. She contends that the requirement that VRI be conducted from a dedicated call center precludes the possibility of an interpreter doing VRI from home. She similarly questions the requirements for things like privacy doors, arguing that if a home business takes the proper privacy precautions such requirements would be unnecessary. She also notes that while these rules are clearly intended to promote privacy they do not consider that hospitals, particularly with 'semi-private' rooms, large pre-op rooms and registration counters, present serious privacy concerns of their own. Throughout her comments her principle complaint seems to be that the draft rules failed to account for her current business model. Finally, she contends that because the requirements in these three sections fall on the call centers, they are outside the interpreters' control, and they are not enforceable.

Response: No change was made to Rule 55(10) for these reasons.
First, with regard to enforceability it must be noted that the business model she appears to be defending has each VRI interpreter working from their own home location, so the requirements are indeed in their control. The rules are unconcerned with the location of a call center, and even the requirement that a second interpreter be present for support is deleted. The proposed rules are about the reliability of the system and the privacy of the d/hh person who is being provided the interpreting as an accommodation. VRI equipment should be used for only VRI purposes because loading other programs on computers can slow them down and puts privacy at risk. With respect to the lack of privacy in hospitals in general, these rules are note intended to secure more privacy for the communications of d/hh persons being provided with VRI interpreters then is received by other patients communicating in other ways, but they are entitled to communication access equal to others.

More important, these rules are neither focused on, nor enforced through the responsibilities of call centers. The Appointing Authority has a legal duty to provide effective communication in accordance with law and these rules set the standards of practice to which interpreters and appointing authorities will be held. These rules are not concerned with whether a call center is business run from an individual interpreter's home, a network of such homes, or a single business structure from which multiple interpreters work at one time. They also do not treat VRI differently depending on whether any, all or none of the equipment and personnel involved are located in Michigan. The rules do however protect the equal access to effective communication of individuals in Michigan who are being provided interpreters as an accommodation.

Suggestions Rule 55(10)(b):

Ascension Health (W-85), noted that many call centers utilize a suite with locked exterior doors and requested clarifying language to support this HIPAA compliant process.

Response: Rule 55(10)(b) was amended.
The requested change was made.

Suggestions Rule 55(10)(d):

Ascension Health (W-85), noted that with respect to the provision in (10(d) is industry standard and practice for HIPAA agreements to be signed at company level, not individual agreements with each employee.

Response: Rule 55(10)(d) was amended.
The requested change was made. (Subsection now appears as Rule 55(10)(d))

Suggestions Rule 55(11)(b):

Ascension Health (W-85), complained that the requirement that a VRI require a 'backup' interpreter be present was an unwarranted heightened standard over in-person interpreter requirements.

Response: Rule 55(11)(b) was deleted.
The requested change was made.

Suggestions Rule 55(11)(e):

Ascension Health (W-85), expressed concern this rule required the Michigan business to "verify" the off-site VRI provider's always had a "superuser" on-site. They inquired whether verification was truly intended, and if so what it would involve.

Response: Rule 55(11)(e) was amended.
The language was clarified to indicate that interpreter and appointing authority needed to require the presence of a superuser on the other's site, but not that they "verify" a superuser's presence. (Subsection now appears as Rule 55(11)(d).)

Suggestions Rule 55(12)(a)
MAASE (W-054) p requests that (12)(a) be changed from "Age 3" to "birth", pointing out that some students enter programs before age 3.

Response: Rule 55(12)(a) was amended).
(Subsection now appears as Rule 55(12)(a).)

Suggestions Rule 55(14)(k)
Ascension Health (W-85), objects to the inclusion of what was then 14(k) which provided that VRI could not be used for any medical appointment which is scheduled more than 24 hours in advance for a patient known to be a d/hh person. They noted that in many situations, it is difficult to get consent in the time frame and it would be exceptionally difficult if "informed" consent was intended to mean signed. Furthermore, consent is not and never has been required in all instances.

Sue Bogden's (W-349) comments, are representative of a great many others told us they have experienced. At a first hospital visit with her husband; "We requested that an interpreter be there and was told that one would be there. I requested to know the interpreter's name but they didn't have that information. Once at the medical facility, we waited over an hour and a half before they told us that there would be no interpreter but we would have to use VRI. (*I have a copy of a note that a nurse wrote which reads: "We have a machined that will communicates with you. It is in the department where you are going. We no longer enlist interpreters. Sorry.")" Being left with no choice they proceeded to using VRI, but there were connection problems and when it finally did connect they were unable to understand the interpreter.

Ms. Bogden goes on to describe how on a follow up appointment; "Due to our previous bad experiences with VRI we asked for them to please contact a live interpreter. They made us wait

an hour and a half, beyond his apt. time and then finally came out and told us that they could not reach the interpreting agency and we would have to use VRI." She concludes, "We should NEVER have to be forced to use VRI when it is OBVIOUS that it is NOT effective communication for us."

Response: Rule 55(14)(k) was amended.
Based on the sum of the comments received it appears that a great many VRI problems relate directly to, or are magnified greatly from, a last minute conflict that results when a d/db/hh person arrives expecting an interpreter and instead is presented with a video screen. Even before the screen is turned on, the patient feels betrayed and begins to recall every horror story he or she ever had or heard involving VRI technology. This is then immediately magnified by the reality that the appointing authority is in a position of absolute power because any demand for an in person interpreter (no matter how reasonable) will require a great delay in services (hours or weeks depending on various circumstances). The provisions added as (15) are almost as much about good customer service as they are about reasonable standards of practice to ensure effective communication is provided. But they also reflect a reality illustrated by Ms. Bogden's story above – waiting until they arrive to inform a patient that VRI be used, denies them the ability to explain that it does not provide them with effective communication.

The basis for this changes to this portion of the rule is thus a simple one, AH was correct that 24 hours' notice was arbitrary, and that consent was not the appropriate standard, simply saying nothing in the rule unacceptably ignores the intent to address the problem created when an appointing authority waits to use VRI to tell a d/db/hh person that VRI is now the only option available. Any pretense that the d/db/hh still has a chance to explain that VRI isn't effective, or to engage in a deliberative process about how to establish effective accommodation is an empty one.

The language used distinguishes deliberately between what "should" happen and what "shall" happen. It is drafted to acknowledge that the rule cannot require (or even expect) an appointing authority to act on information they do not have, but when a patient the doctor or hospital knows is a d/db/hh patient who has requested an interpreter arrives for an appointment they made in advance, they should never arrive expecting a live interpreter and discovering VRI. The patient's request for an interpreter should not suggest one thing when another is intended. When a patient asks for an interpreter, and the office knows they will provide VRI, the d/db/hh person should be informed. (Subsection now appears as Rule 55(~~15~~*13*)) [Corrected 5/29/14]

Suggestions Rule 55(16)

Ascension Health (W-85), suggested that the language in 55(16) that provided a d/hh person utilizing VRI services was to be given access to the equipment at all times. They recommended alternative language like "at all appropriate times." They also requested that, rather than retaining the "ability to connect" if the VRI was disconnected, the "d/hh person shall retain the ability to request VRI when the need for communication arises."

Response: Rule 55(16) was amended.

While it is agreed that there is no reason for someone to be connected at other than "appropriate" times, the word was deemed too vague to be instructive and the access was required when communication is occurring. Similarly vague was language stating the d/hh person would simply have the right to request it be reconnected. Proposed rule 55(16) reflects that a d/hh person using VRI "shall have access to the equipment all times when communication is taking place" and "shall retain the ability to be reconnected." (Subsection now appears as Rule 55(17))

Suggestions Rule 55(17)

Draft rule 55(17) provided that on the third occasion when VRI technology broke down it should be terminated and a live interpreter requested. **Ascension Health** (W-85), expressed concern that without a time frame specified, it appeared this might be applied if there were three failures to connect during a two week hospital visit. They requested language be added placing a timeframe around the failed attempts.

Response: Rule 55(17) was amended.
The language was clarified using the term "proceeding" which is consistent with the verbiage elsewhere, but also to clarify that a repeating breakdown cannot just declared to be 'resolved' for VRI to be resumed during the same proceeding with a reset count of three breakdowns. (Subsection now appears as Rule 55(18))

Suggestions Rule 58 Waivers:

Comments related to the waiver rule exposed a good deal of confusion about what "waiver" it referred to. The specific language in subsection (1) of this rule was directed principally at the "waiver" explicitly mentioned in the statute, which is the total waiver that an appointing authority would require in order to permit a d/db/hh person to insist with an interpreter of their own choosing who the authority recognized as being unqualified and/or ineffective.[2] Subsection (2)'s language prohibiting on coerced waivers was clearly not intended to be directed at waivers requested by the d/db/hh person, but was to be applied more generally to the types of "waivers" being used by appointing authorities and interpreter agencies when they were unable to secure properly qualified interpreters.

A great many commenters described, (sometimes by directly using the term waiver, or more often by just describing a personal experience), the process being "forced" to agree to continue with ineffective communication without any opportunity for either choice or recourse. It is these situations, where d/db/hh persons were being left with no choice but to 'agree' to accept interpreters, or "qualified" interpreters without a required endorsement, that were the intended

[2] This intent confirmed by referencing the "MCRC Interpretive Statement – 05/21/12" related to interpreter student practicums, which was attached to Oakland Community Colleges comments and can be seen at W-203, 207: "The waiver is used primarily when a deaf person utilizes an interpreter(often a friend or family member) even though the interpreter is not legally "qualified." The waiver thus assures that the person for whom the interpreter is being provided fully understands that there can be no assurance of the quality of the interpreter's service, but also permits the appointing authority to honor that person's expressed wishes. A person signing such a waiver is thus accepting the consequences that may result from using an interpreter who is not qualified, including that they may not receive a "true interpretation."

target of the prohibition on coercion. Indeed, it serves little purpose to have a rule that prohibits coercion only in waivers initiated by the d/db/hh person.

There were also other commenters who referred to the process of using less than fully qualified educational interpreters as a 'waiver' process, although that "waiver" is specifically covered as an "exception" pursuant to Rule 27.

These comments collectively resulted in exposing the need to clarify the distinctions between the processes by refining the definitions portion of these rules to better reflect the intent that was already present.

Linda Booth, DHIS (W-009), more than any other commenter, brought the need to clarify the confusion caused by the insufficiently clear waiver language to the fore. She and **Melissa Kizer, DHIS** (W-130), described that DHIS was in the practice of using a "waiver" indicating that a d/db/hh person was aware that the interpreter being provided was in some manner not qualified, and agreeing to continue the proceeding with that interpreter rather than waiting for a time when a different interpreter could be provided.

Ms. Booth stated: "Given Michigan's current interpreter shortage crises the D/DB/HH will often be given the choice of signing a waiver because a qualified interpreter (according to the rules) is not available." She then noted that the draft rules, as she read them, "state that presenting this choice in itself can be considered coercion, when in fact it is simply the result of not having enough interpreters in the State. This will result in the appointing authority either being in violation of the ADA for not providing equal access or in violation of the rules if the D/DB/HH feels they are being forced to sign a waiver if they don't want to wait for services as the appointing authority secures a qualified interpreter." (emphasis added)

Ms. Kizer noted that she read the draft rule to say "that not having available the right certified interpreter" when given as the reason for a waiver "can be deemed as coercion." She stressed the problems this would cause by noting that "this is going to be by far the number one reason why waivers have to be offered in the first place due to the shortage crisis."

They conclude with the recommendation that, in the words of Ms. Booth: "The Rules need to state that this waiver can be offered if the appointing authority cannot secure a qualified interpreter period. The D/DB/HH is not required to sign a waiver and can choose to instruct the appointing authority to reschedule the services when they can acquire a certified interpreter. It is unfair to the appointing authority to be handcuffed in offering a waiver for fear that it could be interpreted by the D/DB/HH as coercion. (emphasis in original).

Diana McKittrick, CAC (W-229), **Michigan Deaf Association** (W-244), also submitted comments specifically related to this Rule, but drew very much the opposite conclusion. They recommend that: "Waivers should only be provided through the division. Agencies, service providers, interpreters should not be allowed to provide waiver application."

Jonathan Measel (W167), expressed still another view of what the waiver rule described. "It sounds like any place of business would force a unqualified signer on us and make us sign the waiver if something goes wrong, they would not held responsible for any mistakes."

Mostly though, the comments received reflected the widely held perception that, whatever it was called, the process by which a d/db/hh person was "asked" to agree to proceed with a communication without being provided with a qualified, effective, interpreter was being abused. The word used to describe what occurred was often neither "asked" nor "waiver" nor any thing of the sort. For example:

Melissa Healy (T-91), described how; "I was forced to be an interpreter for my father while he was having a stroke. And instead of being able to step away and be a daughter, I had to be an interpreter. And that was not fair for either of my parents to not have a qualified interpreter there. It wasn't right for me as a daughter not to be able to have my emotions during that time."

Warren Coryell Jr (W-282), "The Deaf people want the right to choose between the VRI and a live interpreter as it should be. Unfortunately, the VRI has been forced on us, so we have not been given a choice. Once again as has been the case throughout Deaf History we have been ignored. We have stated any times that whatever has been offered is not working but we have been forced to accept because the hearing world said so."

Pat Riley (W-98), stated; "I have been forced to use unqualified terps too many time and as of lately they have gotten worse."

Chasity Coryell (T-49), recommended that; "the hospitals, medical community, doctors, should not be able to force my husband or family members to interpret, (or) forcing us to use VRI."

<u>Rule 58 was amended</u> to reflect the difference between a waiver initiated by a d/db/hh person (which must be in writing) who was declining an appointing authority's offer of a qualified interpreter, and a partial waiver in which (whether in writing or not) a d/db/hh person was agreeing to proceed without a fully qualified interpreter.

<u>Rule 58 was amended</u> to clarify that when no qualified interpreter available, it is permissible (not coercion) to ask a d/db/hh if they want to return when one will be available or waive their right to a qualified interpreter in order to proceed with whatever accommodation is being offered, but that such a waiver was 'partial' because the choice to continue cannot be conditioned upon also waiving the ability to later challenge an appointing authority if their initial failure to provide the accommodation was legally actionable.

<u>Rule 2 was amended</u> to clarify the following terms and concepts in the proposed rules: (m) "Exception" (added); (z) "qualified interpreter" (amended); (mm) "underqualified interpreter" (added), and (nn) "variance" (added)

When an appointing authority or someone acting on their behalf is legitimately unable to provide a qualified interpreter, it is not coercive for them to inquire whether the d/db/hh person would

prefer to proceed as scheduled with an alternate accommodation or to reschedule for a time when a qualified interpreter could be provided. These rules are in fact intended to encourage such a discussion in any other instance where something less than fully effective communication through a qualified interpreter is likely. The d/db/hh person should always be a part of any decision of how to provide the most effective communication possible under existing circumstances.

However, for the purposes of such decisions, it is fundamentally important to understand that while circumstances may compel a d/db/hh person to accept the existence of a present situation, they cannot be asked to "forgive and forget" whatever might have led to its creation. For example a d/db/hh who agrees to proceed with an appointment made three months earlier may agree to proceed without a fully qualified interpreter being provided, but by agreeing to proceed they are not also agreeing to accept that no attempt was made to secure an interpreter until after his or her arrival.

For example, a person who requested an ASL interpreter three weeks in advance of a medical appointment cannot arrive to be told that the only way they can keep the appointment is to accept an interpreter without a medical endorsement AND waive the right to file a complaint based on the failure to provide a properly endorsed interpreter. The office may, and is encouraged to, ask the d/db/hh person what they wish to do moving forward, and doing so may well mitigate any damages resulting from a legal failure to comply with the law IF there was one, but any waiver in such a situation, irrespective of whether it is in writing, is a partial waiver and waives only that which a d/db/hh has the ability to accept or reject.

This is not to suggest that a d/db/hh person has a valid complaint in every instance where an appointing authority is unable to provide a qualified and effective interpreter at a requested appointment time. There are in fact many reasons why this might occur. In most instances, it is expected that the cause will be explained to the d/db/hh person who will then discuss what to do as a result, and who will never consider filing a complaint. The foundational principle is simply that the rules contemplate that the way the right to file a complaint is waived is by not filing a complaint. It is coercive to condition something to which the d/db/hh person is legally entitled (like either a new appointment date with the interpreter or the chance to continue without) upon his or her waiving the complaint to which they are also legally entitled.

The full waiver of all right to later challenge a decision to proceed without a legally required accommodation is therefore limited in these rules to those situations where a d/db/hh person indicates the desire to proceed with an accommodation other than the qualified and effective interpreter being offered by the appointing authority. A d/db/hh person cannot request to use an underqualified or unqualified interpreter of their own choosing and then legally challenge the appointing authority's agreement to allow them to do so. In such instances an appointing authority is encouraged to ensure the d/db/hh person is aware of the willingness to provide the qualified interpreter by use of a signed "waiver."

It is in all parties' interests to be able to openly and frankly discuss how to proceed forward from a given starting point without either admitting or affixing responsibility for what preceded it. This forward looking (only) agreement is defined in the proposed rules as a "partial waiver." It also became apparent when looking at the types of waiver, that the draft, and now the proposed,

rules address the use of interpreters who are "qualified" interpreters as the term was defined, but who were not qualified to interpret in a particular situation, for example because they lacked a legal certification. In order to address these situations in the waiver provision, the term "underqualified interpreter" was used, and it was therefore also added to the definitions.

Distinguishing between the waiver and partial waiver also made clear the need to better clarify that the process by which schools could use if it was necessary to use underqualified educational interpreters was not the same as either. The waivers involved an appointing authority and a d/db/hh person, whereas the schools process involved the division. The schools process was already referred to as an "exception" in the rule, so the term was added to the definitions. Finally, in order to also clarify that the rules, or the law, did not mandate any type of formal waiver process "variance" was defined to include situations where complete compliance with the requirements for an accommodation was not achieved, but where there was no waiver involved.

As proposed, the rules recognize that it is not coercion to present a d/db/hh person with the option of either rescheduling or signing a waiver and proceeding with an available but underqualified interpreter provided that there is no penalty associated with rescheduling. It is in all parties' interests to be able to openly and frankly discuss how to proceed forward from a given starting point without either admitting or affixing responsibility for what preceded it. However a waiver or other decision to proceed does not obviate or affect any responsibility for a failure to provide a qualified interpreter when required to do so. The rules are not intended prohibit any such an agreement not to pursue a legal remedy for a failure to accommodate, only to ensure that any such agreement is exactly that. It is a separate document or agreement in which such a claim is settled.

What the rule does prohibit, is telling a d/db/hh person that, in order to proceed with the doctor appointment for which they have arrived is waive the right to seek legal remedy for the fact that the office never attempted to provide the legally required accommodation. This is not really offering the d/db/hh an option, it is what so many called forcing them to agree, and it is what the rules would call coercion.

PART 6. GRIEVANCE AND COMPLAINT PROCEDURES

Suggestion Rule 61

Linda Booth, DHIS (W-009), **Melissa Kizer, DHIS** (W-130), request the provision in Rule 61 allowing for third parties to file complaints be stricken. Ms. Kizer writes; "No third parties should be allowed to file complaints. This has the potential for abuse and I have personally witnessed D/DB/HH being pressured by third parties to file complaints when they were satisfied with the service.'

Response: No change to Rule 61 has been made.
First, it is believed that some ethics and other violations may well be committed without there being a specific d/db/hh person who would be in a position to have a basis for complaint, and even when there is a d/db/hh person directly involved there is good reason to permit an appointing authority or another interpreter to file complaints based upon first-hand knowledge (which the rule does require). Second, it is believed that eliminating the need to get the third parties to file the complaint should also eliminate any inappropriate pressuring that may be taking place.

Suggestion Rule 63

Linda Booth, DHIS (W-009), **Melissa Kizer, DHIS** (W-130), recommend that the rules "should at least suggest, and better yet require that grievances be addressed by the appointing authority, interpreter and D/DB/HH first- locally."

Response: Rule 63 has been amended.
While agreeing that local and alternate resolution processes are desirable, they are not always available, and they have more limited value unless the parties all agree they may be worthwhile. Subsection (4) was added to Rule 63 to provide that such processes may be entered into by agreement, and doing so would toll all time periods for up to 60 days.

PART 7. PROCEDURES FOR REVOCATION, SUSPENSION, LIMITATION OF CERTIFICATION, REINSTATEMENT

Suggestion Rule 73

David Stuckless, Michigan Interpreting Group (W-153), notes that the rule provides only for suspension periods of 6, 12 or 24 months and possible revocation. He recommends the rule should also offer options of 30, 60 and 90 days. He suggests that; "Only the most egregious actions on the part of an interpreter should result in a 6 to 24 month suspension."

Response: Rule 73 has been amended.
A 10 day suspension was added along with the requested 30, 60, and 90 day periods.

Suggestion Rule 73(5)(a) and (b)

Sandra Maloney, MRID (W-185), recommends that the rule be changed to calendar days.

Response: 73(5)(a) and (b) has been amended.

PART 8. CONTINUING EDUCATION

No substantive comments or requests for changes to Part 8 were received.

PART 9. PROCEDURES FOR RENEWAL

No substantive comments or requests for changes to Part 9 were received.